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CHARLES ELMORE CROPLEY

IN THE

# Supreme Court of the United States

**October Term, 1945**

**No. 517**

D. A. SCHULTE, Inc.

*Petitioner*

*against*

SALVATORE GANGI, suing on behalf of himself and other employees similarly situated

*Respondent*

## RESPONDENT'S BRIEF

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

ISIDORE EXTES
*Counsel for Respondent*

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## RESPONDENT'S BRIEF

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### Statement

Respondent, suing on behalf of himself and nineteen other enumerated persons, brought this action under Section 16 B of the Fair Labor Standards Act of 1938, 29 U. S. C. A., Section 216 (b) to recover unpaid overtime compensation from October 24, 1938 to February 5, 1942 together with liquidated damages and reasonable attorney's fees. Respondents were building maintenance employees employed at petitioner's twenty-three story loft building at 571-583 Eighth Avenue, New York City.

The complaint alleges that during their employment by the defendant, the plaintiff and the other enumerated employees worked a number of hours each week in excess

of the applicable maximum workweek set forth in Section 7 of the Act, without receiving the prescribed overtime compensation. It is further alleged that during the period of their employment a substantial number of tenants in the building were engaged in the production of goods for interstate commerce, and that the plaintiff's and others' duties were necessary to the production of goods during the period of October 24, 1938 to February 5, 1942.

It is uncontroverted that during the period in question the plaintiff and the others worked a number of hours each week in excess of the applicable maximum workweek set forth in the Act without receiving the prescribed overtime compensation. On or about September 24, 1942, long after said overtime compensation had been due and after the decision of the Supreme Court in *A. B. Kirschbaum & Co.* v. *Walling*, 316 U. S. 517, the defendant paid the plaintiff and the others their overtime compensation. On the theory that at the time the defendant paid the plaintiff and others the past due overtime compensation, it was then equally liable for an additional equal amount as liquidated damages. (See Sec. 16 (b) of the Act), this action was instituted to recover the latter sum together with reasonable attorney's fees.

The defendant's answer alleged the affirmative defenses of Accord and Satisfaction and Release, among other defenses and denied that it was bound by the Act.

The action was tried in the United States District Court of the Southern District of New York and resulted in a judgment dismissing the complaint (R. 314). The Court upheld the affirmative defenses of Accord and Satisfaction and Release as a matter of law (R. 314). The District Court found it unnecessary to pass on the question of coverage (R. 314).

The Court below held that the releases are ineffective to bar the action (R. 323) and that the defenses of Accord and Satisfaction are invalid here (R. 324), citing *Brooklyn Sav. Bank* v. *O'Neil* and *Dize* v. *Madrix*, 65 S. Ct. 895. The Court below held that there was coverage for the entire period in suit except for the year 1939 (R. 326).

## REASON RELIED ON FOR DENYING THE WRIT

**The decision below is in complete accord with the decisions of this Court in *Brooklyn Savings Bank* v. *O'Neil*, 65 S. Ct. 895, and *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 86.**

The Court below stated

> "In practical fact the O'Neil case does not offer support for appellee's contention. For there, too, the employer disputed coverage, finally paid the overtime wages due, and forced suit to be brought for the balance. Except for the fact that the present appellee may have been more vociferous in its assertion that its business is local,[4] the facts here are exactly the same as those in the O'Neil case. It may be that, where there is a genuine dispute not as to the law of the Act, but as to facts, such as the amount of labor actually performed, the parties may work out together a fair adjustment of the dispute and that it was this type of situation which the Supreme Court wished to reserve for fu[illegible]er consideration. But use of a disagreement as to the legal interpretation of the Act, turning upon the nature of the employer's business, as a basis for reducing payments under those required by the Act, appears definitely prohibited by the O'Neil case. See 57 Harv. L. Rev. 257; 55 [fol. 481] Harv. L. Rev. 150; 43 Col. L. Rev. 355, 359; *cf.* also Dodd, Administration of Workmen's Compensation, 1936, 186 *et seq.*" (R. 324, 325).

There is absolutely no evidence of any kind whatsoever in the record to show that the petitioner made any effort to ascertain the true nature of its tenants' businesses so

[4] Even this would seem doubtful; see note 2, above.

as to determine whether there was coverage. How had the petitioner exercised his good faith in this alleged dispute? To permit an employer's mere denial of coverage as the basis for a "bona fide dispute" so as to discharge the employer from any and all liability under the Act would make available a simple method for avoiding "the deterrent effect which Congress plainly intended that Section 16 (b) should have." *Brooklyn Savings Bank* v. *O'Neil*, *supra.*

In *Warren-Bradshaw Drilling Co.* v. *Hall*, *supra*, 317 U. S. 88, 92, this Court held:

> "The Act extends at least to the employer who expects goods to move in interstate commerce, *Ibid.* Assuming that such expectation or reasonable basis therefore, was necessary on petitioner's part before the application of the Act to petitioner. It is here present. The record contains ample indication that there were reasonable grounds for petitioner to anticipate at the time of drilling that oil produced by the wells drilled would move into other states. Petitioner closely identified as it is with the business of oil production, cannot escape the impact of the Act by a transparent claim of the ignorance of the interstate character of the Texas Oil Industry."

If the words "oil" and "Texas" are replaced by the words "garment" and "New York" respectively, the above ruling would be directly applicable to the instant case at bar. The petitioner's building is located in the garment district of New York and that for a period of years it regularly rented factory space to contractors and manufacturers in the garment industry. The bulk of tenants are contractors manufacturing goods on the premises. The Court below held that except for the year 1939 more than 20% of the petitioner's tenants were engaged

in the production of goods and "had at the very least reasonable grounds to anticipate that their products would move in other states" (R. 326).

**It is respectfully submitted that there is not here presented a proper occasion for the exercise of the supervisory power of this Court.**

SALVATORE GANGI,
*Suing on behalf of himself and other employees similarly situated, Respondent,*

ISIDORE ENTES,
*Counsel for Respondent.*